Supreme Court, U.S
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In The
Supreme Court of the United States
October Term, 1999

TIMOTHY BLONDHEIM

Petitioner,

vs

JOHN MORGAN, Warden

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are two principal questions. The first pertains to the equal protection clause, the second to the due process clause of the Fourteenth Amendment to the United States Constitution.

I. When a state's highest court accepts jurisdiction of an appeal from an intermediate appellate court, because the intermediate court has certified its decision to the higher court as in conflict with a decision rendered by another intermediate court of review, does the equal protection clause of the Fourteenth Amendment require the court of last resort to also take jurisdiction of the case with which the certified case is in conflict?

II. When a state statute permits a sentencing court to enhance a criminal sentence, does the due process clause of the Fourteenth Amendment require the court to place on the record its reasons for doing so?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The petitioner is Timothy J. Blondheim, currently an inmate at the North Correctional Institution in Marion, Ohio. He was also the petitioner below, in an original action in the Ohio Supreme Court, on a petition for writ of habeas corpus under state law. Mr. Blondheim's attorney of record is Bruce H. Wilson, 1225 West Market Street, Akron, Ohio 44313. Counsel's telephone number is (330) 865-1230.

The respondent, who was also respondent in the Ohio Supreme Court action, is John Morgan, Warden of the North Central Correctional Institution in Marion, Ohio. Counsel for Mr. Morgan is Betty Montgomery, who is the Attorney General for the State of Ohio, and whose address is State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio, 43266-0410. Her telephone number is (614) 466-4320.

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No.

In the Supreme Court
of the
United States

Timothy J. Blondheim

Petitioner,

vs.

John Morgan, Warden

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy J. Blondheim, requests that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this action on October 27, 1999, which sua sponte dismissed Mr. Blondheim's petition for habeas corpus.

OPINIONS BELOW

State v. Blondheim, Summit App. No. 18594
(May 27, 1998), unreported ..... Appendix B

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JURISDICTION

The judgment of the Ohio Supreme Court, dismissing Timothy Blondheim's state petition for writ of habeas corpus, was entered on October 27, 1999. The jurisdiction of this Court rests upon 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invokes the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution. The case also involves Ohio Revised Code ("ORC") 2929.14(B), which reads as follows:

> Except as provided in division (C), (D)(2), (D)(3), or (G) of this section or in Chapter 2925 of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the

> offender's conduct or will not adequately protect the public from future crimes by the offender or others.

The full text of Ohio Revised Code 2929.14 is reproduced in the appendix.

STATEMENT OF THE CASE

Timothy J. Blondheim was convicted on April 25, 1997, of the crimes of endangering children, a felony of the second degree; endangering children, a felony of the fourth degree; and felonious assault, a felony of the second degree. The conviction grew out of an injury to Mr. Blondheim's child, an injury consistent with what has been termed "shaken-baby syndrome."

On June 5, 1997, the Summit County (Ohio) Court of Common Pleas sentenced Mr. Blondheim to a term of five years' imprisonment for the crime of endangering children, a felony of the second degree; to a term of one year for the crime of endangering children, a felony of the fourth degree; and to a term of five years for the crime of felonious assault, a felony of

the second degree. The sentences were to be served concurrently.

Mr. Blondheim appealed his sentence to the Court of Appeals for the Ninth Appellate District, Summit County, Ohio. That court, on May 27, 1998, affirmed the sentence. State v. Blondheim, Summit App. No. 18594 (1998), unreported.

Mr. Blondheim then sought discretionary review in the Ohio Supreme Court. On October 7, 1998, the Ohio Supreme Court declined to take jurisdiction of the case. State v. Blondheim, Sup.Ct. Case No. 98-1380 (1998), unreported.

Mr. Blondheim raised no federal question in either the Ohio Court of Appeals or the Ohio Supreme Court. His appeals were solely on the basis of the failure to apply the plain language of the state's sentencing law: his sentence had been enhanced in total disregard of ORC 2929.14(B).

For a felony of the second degree, the most serious of the offenses of which Mr. Blondheim was convicted, and for which he received a concurrent term of five years, the shortest prison term under ORC 2929.14(A)(2) was two years.

ORC 2929.14(B) provides that the shortest prison term authorized by division (A), supra, is also the maximum, unless the sentencing court makes certain findings on the record. Section 2929.14(B) says the court "shall impose the shortest term" authorized by division (A) * * *

> if the offender previously has not served a prison term * * * unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender or others.

Mr. Blondheim was a first-time offender; the trial court did not make the finding required by section 2929.14(B); and there was no basis in the record for such a finding. This was his argument on appeal in the state courts.

In a case raising the same issue, the Ohio Court of Appeals for the Eleventh Appellate District reversed a trial court's sentence for lack of the findings required by ORC 2929.14(B). State v. Edmonson, Portage App. No. 97-P-0067 (Sept. 25, 1998), unreported. Then, under a procedure for

resolving conflicts among Ohio's intermediate courts, the Eleventh District Court of Appeals certified its decision to the Ohio Supreme Court, as in conflict with certain other appellate decisions, including specifically State v. Blondheim, from the Ninth Appellate District.

The Eleventh District's order certifying a conflict was entered on December 2, 1998. State v. Edmonson, Portage App. No. 97-P-0067 (1998), unreported. By order dated January 20, 1999, the Ohio Supreme Court determined that a conflict existed and ordered the issue briefed. State v. Edmonson, Supreme Court Case No., 98-2603, 84 Ohio St.3d 1473 (1999).

On May 27, 1999, while the certified conflict was pending in the Ohio Supreme Court, and on the basis of that conflict, Timothy Blondheim filed his first petition for a state writ of habeas corpus with the Ohio Supreme Court. The petition asked that Mr. Blondheim's case be taken in with Edmonson and held for further review by the Supreme Court pending its decision in the Edmonson case. His petition said that habeas corpus was the only state remedy available to him,

"to vindicate his rights to due process and equal protection under the United States Constitution and the Constitution of the State of Ohio."

On June 30, 1999, the Ohio Supreme Court sua sponte dismissed the petition, giving no reasons for the dismissal. Blondheim v. Morgan, Warden, Supreme Court Case No. 99-1009 (1999), unreported.

On September 8, 1999, the Ohio Supreme Court affirmed the judgment of the Eleventh District Court of Appeals. In State v. Edmonson, 86 Ohio St.3d 324 (1999), the Supreme Court decided that, though R.C. 2929.14(B) did not require the reasons for a trial court's findings, the statute did require explicit findings on the record, in order to sentence a first-time offender to any term of imprisonment longer than the shortest term set by statute. The case was sent back to the trial court for re-sentencing.

On September 17, 1999, after the decision in State v. Edmonson, Timothy Blondheim filed his second petition with the Ohio Supreme Court for a state writ of habeas corpus. He

asked the Supreme Court to apply the holding in Edmonson to his case. Invoking the due process and equal protection clauses of the state and federal constitutions, his petition said:

> Habeas corpus is the only remedy now available to [petitioner], to vindicate his rights under both the United States Constitution and the Constitution of the State of Ohio. Those rights are: (a) the right to a meaningful review of his case, guaranteed by the due process clauses of the state and federal constitutions; and (b) the right to equal protection under the state and federal constitutions, that is, the application of the [Ohio Supreme Court's] holding in State v. Edmonson, supra, to petitioner's case.

This second state habeas petition was denied by the Ohio Supreme Court, sua sponte, on October 27, 1999. Blondheim v. Morgan, Warden, Supreme Court Case No. 99-1718 (1999), unreported. Again, no reasons were given. From this last decision of the Ohio Supreme Court, Timothy Blondheim now brings this proceeding in the United States Supreme Court for a writ of certiorari.

Mr. Blondheim has also filed a petition for writ of habeas corpus with the United States District Court, Northern

District of Ohio. That petition, filed on October 6, 1999, is currently pending. It rests upon the same grounds as Mr. Blondheim's petition to the Ohio Supreme Court, as well as the present petition to the United States Supreme Court.

ARGUMENT

Equal Protection

Ohio provides one appeal as of right, in both civil and criminal cases, which is an appeal to an intermediate reviewing court. Any further review is in the Ohio Supreme Court; and in most instances it is, as it was in the present case, discretionary. When the Ohio Supreme Court declined to take jurisdiction of Mr. Blondheim's case, his direct appeals were concluded.

Shortly after Mr. Blondheim's appeals were exhausted, the Ohio Supreme Court took jurisdiction of, and subsequently decided the Edmonson case. State v. Edmonson, 86 Ohio St.3d 324 (1999).

The general rule, of course, is that once a judgment becomes final, a party is not entitled to the benefit of a subsequent change in the law. However, in the Edmonson case,

the Ohio Supreme Court did not change the law. It interpreted and applied an existing statute, a statute which was on the books when Timothy Blondheim was sentenced. Nor did the court overrule or modify any prior interpretation it had given to the statute.

Mr. Blondheim and Mr. Edmonson were both sentenced in June, 1997. Each had his sentence enhanced under the same statute. The Ohio Supreme Court accepted jurisdiction of Edmonson because it was in conflict with, among others, the Blondheim case. And the court resolved that conflict in favor of the decision in Edmonson, and against the decision in Blondheim. Nevertheless, Ohio provides no remedy for a person in Mr. Blondheim's situation. The certification of a conflict brings before the Ohio Supreme Court only the case certified, not the case with which it is in conflict.

In Fiore v. White, 68 U.S.L.W. 4001, 120 S.Ct. 469 (1999), a state court refused to reverse the petitioner's conviction, though his co-defendant had secured a reversal on a ground equally applicable to the petitioner. The United States

Supreme Court certified to the Pennsylvania Supreme Court the question of whether the statutory interpretation given by the Pennsylvania Supreme Court in the co-defendant's case had changed the law, or whether it was simply an application of the law as that law existed on the date of the petitioner's conviction.

In the present case, the Ohio Supreme Court interpreted a relatively new statute. State v. Edmonson did not change or modify any prior interpretation given that statute by the Ohio Supreme Court.

Due Process

There is no federal constitutional right to an appellate review of a criminal sentence. Abney v. United States, 431 U.S. 651, 656 (1977); McKane v. Durston, 153 U.S. 684 (1894). However, when a state "opts to act in a field where its action has significant discretionary elements, it must nonetheless acct in accord with the dictates of the Constitution * * * . Evitts v. Lucey, 469 U.S. 387, 401 (1985).

Section 3, Article IV of the Ohio Constitution provides that in non-capital criminal cases, courts of appeal, as provided

by law, may review and affirm, modify, or reverse judgments or final orders of the courts of record. And ORC 2953.08(A) provides a right to appeal a sentence that is "contrary to law."

Timothy Blondheim's sentence was contrary to law. The law of Ohio states that, if there is to be incarceration for a first-time offender, it is to be for the minimum period set by statute, unless the court finds on the record that a minimum term would "demean the seriousness of the offender's conduct," or would not "adequately protect the public from future crimes by the offender or others." R.C. 2929.14(B), in part.

The law of Ohio allows a sentencing judge wide discretion. Before sentencing a defendant to a term of imprisonment greater than that statutorily presumed appropriate for a first-time offender, however, the judge is required to make the finding required by the enhancement statute. And this finding should be something more than merely reciting in a conclusory way the "talismanic" words of the statute. The judge should be required to explain or give reasons.

The Ohio sentencing statute requires a judge to make a finding on the record, sufficient to justify the harsher sentence. The requisite "finding" must be more than the judge's certification that she or he has performed the analysis required by statute.

If a convicted defendant is a first-time offender, and the court elects to impose a prison term, it must impose the shortest term authorized for the offense, "unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct, or will not adequately protect the public from future crime by the offender or others." (Emphasis added). The finding contemplated by ORC 2929.14(B) is essential for effective appellate review.

Ohio courts have themselves recognized the need for judicial findings, even when not expressly required by rule or statute. Findings are essential for proper review. They disclose to a reviewing court whether or not a court has properly exercised its discretion.

> While there is no explicit requirement in Civ.R. 23 that the trial court make formal findings to support its decision on a motion for class certification, there are compelling policy reasons for doing so. Aside from the obvious practical importance, articulation of the reasons for the decision tends to provide a firm basis upon which an appellate court can determine that the trial court exercised its discretion within the framework of Civ.R. 23 and discourages reversal on the ground that the appellate judges might have decided differently had they been the original decisionmakers.
>
> Hamilton v. Ohio Sav. Bank (1998), 82 Ohio St.3d 67, 70-71.

In a case involving a property division, the Ninth District Court of Appeals -- the same court that said explicit findings were not necessary in Mr. Blondheim's case -- held the failure to make statutorily required findings was itself an abuse of discretion.

> Because of the lack of evidence in the record supporting a conclusion that the trial court considered the mandatory statutory factors, and because the trial court failed to indicate the factual basis for its award in its judgment entry, we find the trial court's division of marital property and debt, and its support award, in the case *sub judice* to be an arbitrary abuse of discretion.

Vanderpool v. Vanderpool (1997), 118 Ohio App.3d 876, 880-881.

Findings are no less necessary in criminal cases. Due process does not end with a conviction.

The judge in the present case, at the sentencing hearing, said that the injury was serious. The sentencing judge in the Edmonson case made similar remarks, but this wasn't enough to satisfy the statute or the Ohio Supreme Court.

Petitioner was convicted of the crime of endangering children, a felony of the second degree "[i]f the violation results in serious physical harm to the child involved***." ORC 2919.22(E)(3), in part. For this offense, a felony of the second degree, the legislature has prescribed a maximum of two years' imprisonment for a first-time offender, unless the sentencing court finds on the record that this legislatively-prescribed term would "demean" the seriousness of the offender's conduct. The fact that the injury was serious made petitioner's crime a felony of the second degree. That fact alone did not justify more than doubling his term of imprisonment.

CONCLUSION

In State v. Edmonson, 86 Ohio St.3d 324 (19999) the Ohio Supreme Court held that a sentencing court must make findings, but need not include its reasons for imposing the harsher sentence. This may be all that the state statute (ORC 2929.14) requires, but due process should require more.

Petitioner asks this Court to take jurisdiction of his case. Petitioner seeks at least the equal protection of Ohio law. More than that, a sentencing court should be required to give its reasons for enhancing a sentence. This would seem to be basic due process. The Court should reverse the Ohio Supreme Court's denial of his application for writ of habeas corpus.

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APPENDICES

APPENDIX A

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

CR 96 11 2764
May Term 1997

The State of Ohio
v.
Timothy J. Blondheim

JOURNAL ENTRY

THIS DAY, to-wit: The 3rd day of June, A.D., 1997, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, TIMOTHY J. BLONDHEIM, being in Court with counsel, EDWARD WEBER, for sentencing; having heretofore on April 25, 1997, was found GUILTY by a Jury of the crime of ENDANGERING CHILDREN, as contained in Counts One (1) and Two (2) of the Supplement One to Indictment, and FELONIOUS ASSAULT, as contained in Count Three (3) of the Supplement One to Indictment.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be

pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant, TIMOTHY J. BLONDHEIM, be committed to the Ohio Department of Rehabilitation and Corrections, for a definite period of Five (5) Years for punishment of the crime of ENDANGERING CHILDREN, Ohio Revised Code Section 2919.22(B)(2), a felony of the second (2nd) degree, for a definite period of One (1) year for punishment of the crime of ENDANGERING CHILDREN, Ohio Revised Code Section 2919.22(A), a felony of the fourth (4th) degree, and for a definite period of Five [sic] (5) Years for punishment of the crime of FELONIOUS ASSAULT, Ohio Revised Code Section 2903.11(A)(1), a felony of the second (2nd) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the

Summit County Clerk of Courts, 53 University Avenue, Akron, Ohio 44308.

The Court further finds the following pursuant to O.R.C. 2929.13(B): (at lease ONE must be found)

__X__ victim suffered serious physical harm;

The Court further finds the Defendant is not amenable to community control and that prison is consistent with the purposes of O.R.C. 2929.11.

After release from prison, the Defendant is ordered subject to post-release control to the extend the parole board may determine as provided by law. Defendant is ORDERED to pay all prosecution costs, including any fees permitted pursuant to O.R.C. 2929.18(A)(4).

IT IS FURTHER ORDERED, pursuant to the above sentence that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the sentence imposed in Counts One (1), Two (2), and Three (3) of the

Supplement One to Indictment, shall be served CONCURRENTLY and not consecutively with each other.

Based on an investigation by the Summit County Adult Probation Department, this Court finds that the Defendant is entitled to Forty Two (42) Days of jail time credit towards the sentence imposed in this case.

/s/Beth Whitmore, Judge
Court of Common leas
Summit County, Ohio

APPENDIX B

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT
STATE OF OHIO

18594

STATE OF OHIO
Appellee,
v.
TIMOTHY J. BLONDHEIM
Appellant.

DECIDED: May 27, 1998

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Judge.

Defendant-appellant Timothy J. Blondheim appeals the judgment of the Summit County Court of Common Pleas sentencing him to five years of incarceration. We affirm.

On November 15, 1996, the Summit County Grand Jury indicated Blondheim. The indictment contained three counts: 1) endangering children, in violation of R.C. 2919.22(B)(1), a felony of the second degree; 2) endangering children, in violation of R.C. 2919.22(B)(2), a felony of the third degree; and 3) felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree. On December 3, 1996, a supplement to the indictment was filed, adding three more counts: 4) endangering children, in violation of R.C. 2919.22(B)(2), a felony of the second degree; 5) endangering children, in violation of R.C.2919.22(A), a felony of the fourth degree; and 6) felonious assault, in violation of 2903.11(A)(1), a felony of the second degree.

Counts one, two and three were dismissed by the state. Counts four, five, and six were thereafter know as counts one, two, and three. A jury trial was held and on April 28, 1997, Blondheim was found guilty of all three counts. The jury found that Blondheim's endangerment of children resulted in physical harm. On June 26, 1997, the trial court sentenced

Blondheim to a definite period of five years of incarceration on count one, a definite period of one year of incarceration on count two, and a definite period of five years of incarceration on count three. All terms of incarceration were to be served concurrently. Blondheim appeals, assigning two errors.

I.

Blondheim's first assignment of error is:

THE SENTENCE IMPOSED UPON DEFENDANT-APPELLANT IS CONTRARY TO LAW

On November 6, 1996, Blondheim was home alone with his six to seven-week old daughter, Montgomery. At approximately 2:02 p.m., a 911 call regarding a baby in distress was made. Paramedic Lt. Michael Scott responded to the 911 call and went to the residence. Upon arrival, Lt. Scott determined that Montgomery was in quite a bit of distress and was having difficulty breathing. The baby was transported to Children's Hospital Medical Center of Akron (Children's) by ambulance as a "code 3," which Lt. Scott testified was "considered life or limb threatening." Lt. Scott further testified

that he had assess Montgomery's condition to be critical. When asked what had happened to Montgomery, Blondheim stated that he had left her in her "bouncy seat" after feeding her a bottle. Blondheim then state that he went to the bathroom, and when he returned, he found Montgomery on the floor, face down, with milk coming out of her nose and mouth. When she appeared to have difficulty breathing, Blondheim called 911 for help.

Blondheim repeated essentially the same story to Montgomery's health care providers and to persons investigating the situation: that he left the baby alone, unstrapped in her "bouncy seat," and that she fell a maximum of six inches to the floor, where he found her a few minutes later. There was testimony at the trial that he told at least one person that he found the baby "face up."

Michael Billow, M.D., a pediatric intensivist at Children's, treated Montgomery for her injuries. Dr. Billow testified that Montgomery's condition was such that "if certain therapeutic, medical maneuvers weren't performed, she would

have died right there in the emergency room." Dr. Billow testified that Montgomery received a tube in her airway to control her breathing and that she was having seizures, and that these seizures were difficult to control. Dr. Billow testified that Montgomery suffered "retinal hemorrhages" and brain swelling and that he was "concerned that she may progress over a 12-, 24- to 48-hour period to potential brain death." Dr. Billow also stated that in his professional opinion, Montgomery could not have sustained her injuries by falling a short distance from a "bouncy seat" to a carpeted floor. When asked what could have caused Montgomery's injuries, Dr. Billow responded that his opinion, based on a reasonable degree of medical certainty, was that Montgomery had "suffered both a shaking injury***and an injury of [] direct sudden impact." Dr. Billow testified that Montgomery's injury was severe and that the baby was "essentially in a coma."

Dr. Richard Kraus, a radiologist at Children's testified that Montgomery had a "subarachnoid hemorrhage and subdural hemorrhage and edema, or swelling," of the brain

and that a more recent CT scan revealed that Montgomery's brain had atrophied.

Montgomery was eventually moved from the intensive care unit at Children's to a regular floor. Nicholas Libertin, M.D., one of Montgomery's pediatricians, testified that he and his partners took over the care of Montgomery when she was release from ICU and that they were concerned because Montgomery "progressed slowly" and "had frequent seizures." Montgomery was in the hospital a total of nineteen days. Dr. Libertin testified that Montgomery, at age seven months, appeared to be functioning at the level of a four- to five-month old baby, and Montgomery's head did not appear to be growing normally, which may have been an indicator that her brain was not growing properly.

Jeff Lamkin, M.D., the opthamologist who was treating Montgomery, testified that Montgomery had "vitreous hemorrhages" in both eyes and had developed a cataract in her right eye, which was a very serious condition in an infant.

Montgomery eventually had surgery on her right eye, and at the time of the trial, was awaiting surgery on her left eye.

Dr. Richard Steiner was the medical director of the C.A.R.E. Center at Chidren's. The C.A.R.E. Center is the part of Chidren's which evaluates abused or maltreated children. Dr. Steiner testified that:

> Shaken baby syndrome is a group of injuries that baby suffers when they are violently shaken. This constellation of injuries includes subdural hematoma with brain injury, includes retinal hemorrhages, includes fractures of the ribs and also fractures of the bones at the joints.

Dr. Steiner stated that some or all of the injures may be present in "shaken baby syndrome" and that Montgomery had suffered two of the four injuries described.

Amy Richardson, M.D., Blondheim's expert witness, testified that by reading Montgomery's medical record, she was of the opinion that Montgomery exhibited evidence of "some pretty severe injury to her eyes."

Blondheim requests that this court reverse his sentences. However, this court may vacate or modify a sentence only if it clearly and convincingly finds that one of

four conditions exist. *State v. Miller* (April 29, 1998), Summit App. No. 18465, unreported, at 3. These conditions are set forth in 2953.08(G)(1)(a) through (d). We do not clearly and convincingly find that any of these conditions exist.

> R.C. 2929.14 governs basic prison terms and provides in part:
>
> (A)(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
>
> ***
>
> (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

Therefore, pursuant to R.C. 2929.14, the trial court could have imposed a prison term of up to eight years on each of Blondheim's second degree felony convictions, and up to eighteen months on his fourth degree felony conviction. However, R.C. 2929.14 further provides that:

> (B) [I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to

> division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

The trial court made several comments regarding the seriousness of Blondheim's offense and the trial court's belief that Blondheim was likely to commit another offense in the future. The state argues that the trial court's comments on the record "implicitly" indicate that the court believed that a minimum sentence would demean the seriousness of Blondheim's conduct. We agree. At Blondheim's sentencing hearing, the trial court stated:

> THE COURT: Yes, this is a court of justice, and the court needs to have compassion. But there's no way that I can see my way to returning this Defendant to live with his family under the present circumstances.
>
> ***
>
> The fact of the matter is that a very serious injury, a life-threatening injury, was done to this child.
>
> ***

> I make my decision***on the events themselves, the serious life-threatening condition of the child at the time, and my conviction that in fact Mr. Blondheim did in fact commit this offense.
>
> ***
>
> In looking for just resolution, I looked somewhere for evidence that this Defendant and the family recognize and accept responsibility for what has happened, because without that, any counseling, any community control, anything that I put in place is not likely to be effective.
>
> The psychological report that I have received confirms my own observations that this family is in denial and not prepared to accept the responsibility for what has happened. The conclusions are that this defendant demonstrates a personality style characterized by denial, repression and minimizing problems, that he is unlikely to see himself as being in need of change or introspection.
>
> Under these circumstances, whatever happened is likely to reoccur, and I cannot possibly permit this defendant to return to his family[.]

The language of R.C. 2929.14 does not require an *explicit* finding that either: 1) the shortest prison term will demean the seriousness of the offense; or 2) the shortest prison term will not adequately protect the public from future crime.

This court has held that explicit findings are not necessary to satisfy the requirements of R.C. 2929.14. See *State v. Crangle* (Aug. 6, 1997), Summit App. No. 18268, unreported, at 3: *State v. Miller* (April 29, 1998), Summit App. No 18645, unreported, at 4.

> Our review of the record in this case reveals that the trial court had a basis for imposing the maximum sentence, and that it indicated its reason at the sentencing hearing. The trial court indicated on the record that it had authority under the new sentencing statue to sentence Crangle to the maximum penalty because this was his third conviction for a sexual offense against a child. By explicitly referring to the new statute and the fact that Crangle had two prior convictions for offenses similar to the one at issue, the trial court must have implicitly found that Crangle was an offender who posed a great likelihood of committing future crimes. We find no error in such a conclusion. The trial court, therefore, had authority under R.C. 2929.14(C) to impose the maximum sentence for Crangle's conviction of gross sexual imposition. Crangle's assignment of error is overruled.

Crangle, supra, at 3.

Although the trial court did not explicitly recite the "magic words" set forth in R.C. 2929.14(B), we hold that R.C. 2929.14(B) does not require such "talismanic" words. See

State v. Fincher (Oct. 14, 1997) Franklin App. No. 97APA03-352, unreported. The trial court's comments and the record support a conclusion that the trial court found that a sentence of two years would demean the seriousness of Blondheim's crime. In addition, the trial court states its belief that Blondheim was in denial and therefore likely to repeat his crimes. When viewing these comments in light of the testimony taken at Blondheim's trial and sentencing hearing, we conclude that the trial court must have made *implicit* findings that a two-year sentence for the second degree felonies and a six-month sentence for the fourth degree felony would demean the seriousness of the crimes *and* that Blondheim posed a danger to Montgomery and others. Blondheim's first assignment of error is overruled.

II.

Blondheim's second assignment of error is:

> THE TRIAL COURT COMMITTED PLAIN ERROR TO DEFENDANT-APPELLANT'S PREJUDICE BY FAILING TO MERGE THE COUNTS OF THE INDICTMENT FOR SENTENCING PURPOSES WHERE IT WAS

CLEAR THAT THE COURTS WERE ALLIED OFFENSES OF SIMILAR IMPORT.

Blondheim argues that the counts against him should have been merged for sentencing purposes, yet he failed to raise this issue before the trial court. Normally, an appellate court will not consider errors not raised at the trial level. *State v. Combs* (Dec. 4, 1991), Summit App. No. 15025, unreported, at 3. A plain error is an error or defect that affects substantial rights and "may be noticed although [it was] not brought to the attention of the court." Crim.R. 52(B). An error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Campbell* (1994), 69 Ohio St.3d 38, 49, ceriorari [sic] denied (1994), 513 U.S. 913, 130 L.Ed.2d 204; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. "'The plain error rule is to invoked only in exceptional circumstances to avoid a miscarriage of justice[.]'" *Id.* at 95, quoting *United States v. Rudinsky* (C.A. 6 1971), 439 F.2d 1074, 1076.

Moreover, the record indicates that the crimes of felonious assault and endangering children were committed

separately. See R.C. 2941.25(B). R.C. 2919.22(A) (child endangering) prohibits a parent from creating a substantial risk to a child by violating a duty of care, protection or support. R.C. 2919.22(B)(2) prohibits a person from torturing or cruelly abusing a child. R.C. 2903.11(A)(1) (felonious assault) prohibits a person from knowingly causing serious physical harm to another. The record supports that Blondheim endangered six-week old Montgomery when he shook her (count one). There is evidence in the record that he again endangered baby Montgomery when he lied to her health care providers about the cause of her injuries, depriving them of essential medical history needed to assess and treat Montgomery (count two).

There is also evidence in the record to establish that Blondheim knowingly caused baby Montgomery serious physical harm. One doctor testified that Montgomery suffered a sudden impact injury in addition to the shaking injury. The trial court did not err in not merging the counts against Blondheim.

Assuming, *arguendo*, that the felonious assault and second degree felony endangering children counts are allied offenses of similar import, this court has held that there is no plain error where the sentences run concurrently. *Combs, supra,* at 3. Blondheim's second assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to the appellant.

Exceptions.

/s/ William R. Baird
For the Court

Slaby, P.J.
Milligan, J.
Concur

(Milligan, J., retired Judge of the Fifth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution.)

APPEARANCES:

EDWARD WEBER, Attorney at Law, 159 S. Main Street, Suite 1108, Akron, Ohio 44308, for Appellant.

MAUREEN O'CONNOR, Prosecuting Attorney, and ALLISON McCARTHY, Assistant Prosecuting Attorney, Appellate Division, Summit County Safety Building, 53 University Avenue, Akron, Ohio 44308, for Appellee.

APPENDIX C

THE STATE OF OHO
Appellant,
v.
EDMONSON
Appellee.

[Cite as *State v. Edmonson* (1999), 86 Ohio St.3d 324.]

Criminal law – Penalties and sentencing – R.C. 2929.14(B), construed and applied.

R.C. 2929.14(B) does not require that the trial court give its *reasons* for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence.

See: West's Ohio Digest, Criminal Law 986(3)
(No. 98-2603 – Submitted June 9, 1999 – Decided September 8, 1999.)

Certified by the Court of Appeals for Portage County, No. 97-P-0067.

Antione T. Edmonson was convicted in 1997 on one count of aggravated robbery for violating R.C. 2911.01(A)(1). Though this was Edmonson's first prison sentence, the trial

court sentenced him to the maximum term of imprisonment. Edmonson appealed, arguing that the trial court disregarded the mandates of R.C. 2929.14 when sentencing him to the maximum term of imprisonment and, therefore, his sentence was contrary to law. He contended that R.C. 2929.14(B) and (C) require a trial court to make certain findings on the record (1) when it sentences a defendant who has served a prison term to a sentence other than the minimum sentence, and (2) when it sentences a defendant to a maximum prison term.

The Court of Appeals for Portage County agreed that, based on the language of R.C. 2929.14(B) and (C), certain findings are to be made on the record by the trial court and that a "finding" implies a recitation of the operative facts on which the finding is based. The court of appeals determined that the sentence was contrary to law because the trial court failed to make explicit findings that "demonstrate why the minimum term of imprisonment should not have been granted under R.C. 2929.14(B)" and why the maximum sentence should be imposed under R.C. 2929.14(C). The court of

appeals, therefore, vacated Edmonson's sentence and remanded the matter for further proceedings.

The court of appeals, finding its judgment to be in conflict with the decisions of the Ninth Appellate District in *State v. Crangle* (Aug. 6, 1997), Summit App. No. 18268, unreported, 1997 WL 460161; *State v. Miller* (Apr. 29, 1998), Summit App. No. 18645, unreported, 1998 WL 208830; and *State v. Blondheim* (May 27, 1998), Summit App. No. 18594, unreported, 1998 WL 281917, certified the issue to this court for review and final determination. In accordance with S.Ct.Prac.R. IV(2)(C) and *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 613 N.E.2d 1032, paragraph one of the syllabus, we agreed to accept the case.

Victor V. Vigluicci, Portage County Prosecuting Attorney, and *Kelli K. Norman,* Assistant Prosecuting Attorney, for appellant.

Hirt & Hirt and *Davis S. Hirt*, for appellee.

David H. Bodiker, Ohio Public Defender, and *John Fenlon,* Assistant Public Defender, urging affirmance for *amicus curiae,* Office of the Ohio Public Defender.

Cook, J. Based on the recent changes to the sentencing law in Ohio, minimum sentences are favored for first-time imprisonment and maximum sentences are disfavored generally. For instance, R.C. 2929.14(B) requires a trial court to impose a minimum sentence for first-time imprisonment unless it specifies on the record that the shortest prison term will demean the seriousness of the conduct or will not adequately protect the public from future crime by the offender. And R.C. 2929.14(C) and 2929.19(B)(2)(d) prevent a court from imposing a maximum sentence for a single offense unless the court records findings that give its reasons for selecting the maximum. Edmonson's sentencing raises both of these issues because Edmonson was convicted of a single offence, was faced with imprisonment for the first time, and was sentenced to the maximum term of imprisonment.

I

A

R.C. 2929.14(B)

R.C. 2929.14(B) reads as follows:

"[I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offended and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

The appellate districts in this state currently hold differing opinions about what information a trial court must include in a sentencing hearing record when imposing a sentence that is longer than the minimum upon an offender expected to receive the minimum sentence according to the

presumption in R.C. 2929.14(B). The appellate debate in this state centers on the scope of the statutory phrase "finds on the record."

We construe this statute to mean that unless a court imposes the shortest term authorized on a felony offender who has never served a prison term, the record of the sentencing hearing must reflect that the court found that either or both of the two statutorily sanctioned reasons for exceeding the minimum term warranted the longer sentence.

R.C. 2929.14(B) does not require that the trial court give the *reasons* for its finding that the seriousness of the offender's conduct will be demeaned or that the public will not be adequately protected from future crimes before it can lawfully impose more than the minimum authorized sentence. By contrasting this statute with other related sentencing statutes, we deduce that the verb "finds" as used in this statute means that the court must note that it engaged in the analysis and that it varied from the minimum for at least one of the two

sanctioned reasons. With other sentencing statutes, the General Assembly explicitly demands that courts give reasons. R.C. 2929.19(B)(2) requires a trial court to "make a finding that *gives its reasons* for selecting the sentence imposed." (Emphasis added.) In R.C. 2929.19(B)(2)(b), the General Assembly requires a court to provide a finding and an explanation by stating that the court shall set forth "the basis of the findings it made." We discern from the difference in the language of these sections within the same chapter and on the same subject-sentencing-that had the General Assembly intended the R.C. 2929.14(B) finding to include reasons, it would have explicitly expressed that intent as it did in R.C. 2929.19(B)(2).

Our deduction is buttressed by other language in the sentencing statutes. The phraseology in R.C. 2953.08(A)(2), for example, supports the view that the statutory purpose is fulfilled when a court notes that it has considered the statutory criteria and specifies which of the given bases warrants its decision to vary from the preferred minimum sentence. It

reads that a defendant may appeal as a matter of right if "the court did not *specify* at sentencing *that it found* one or more factors." (Emphasis added.) And likewise, the text of R.C. 2953.08(G)(1)(b) ratifies the view that in enacting the new sentencing laws, the General Assembly only sought to confirm that courts *considered* the statutory requirements by stating that a defendant may obtain certain relief if "the court did not *specify* in the finding it makes at sentencing *that it found* one or more of the factors specified." (Emphasis added.) The structure of the various sentencing statutes suggest that the General Assembly approached felony sentencing by mandating a record reflecting that judges considered certain factors and presumptions to confirm that the court's decision-making process included all of the statutorily required sentencing considerations.

Edmonson contends that construing the statute to require findings without also requiring the court to articulate its reasoning will hamper appellate review, and that the appellate courts will be unnecessarily forced to review the

entire record. But because R.C. 2953.08(F) explicitly obligates the appellate courts to review the record, we discount this argument.

B.

Having determined that a trial court sentencing an offender to his first imprisonment must specify on the record that one or both reasons allowed by R.C. 2929.14(B) justify a sentence longer than the minimum, we next assess whether the trial court did so in this case. The record shows that prior to imposing the maximum sentence, the court noted the following:

"I read the record that [*sic*] you have had problems, been locked down in a lock-down facility on two different occasions.[1]

---

[1] The lock-down facility was a jail, not a prison. See R.C. 2929.01(CC) (defining "prison")' R.C. 2929.01(V) (defining "jail").

"I find you to be a very dangerous offender and you to commit a crime again [*sic*]. This was a terrible incident with a person who has [*sic*] a gun, robbing people.

"Therefore, it is the sentence of this Court, that you be confined***[for] the sentence of ten years."

In the judgment entry, the trial court stated:

"The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12.

"***

The Court further finds that [Edmonson] is a dangerous offender, that recidivism is likely, and that a gun was used during this incident."

Although one or more of the remarks by the trial court might be argued to support a finding that the three-year minimum sentence would demean the seriousness of Edmonson's conduct or that the public would not be adequately protected from his future crime, the trial court did not specify either of these reasons listed in R.C. 2929.14(B) as supporting its deviation from the minimum sentence of three years. With this record, there is no confirmation that the court first considered imposing the minimum three-year sentence and then decided to depart from the statutorily mandated minimum based on one or both of the permitted reasons. Accordingly, we agree with the judgment of the court of appeals vacating the trial court's sentence and remanding this cause to the trial court for resentencing.

II

A

R.C. 2929.14(C) and 2929.19(B)(2)(d)

In Part I of this opinion, we considered the challenge to the sentencing decision that denied Edmonson the statutorily mandated *minimum* sentence without the record finding necessary to impose a longer one. In Part II, we consider Edmonson's claim on appeal that the sentencing decision also fails to meet the statutory requirements for imposing a *maximum* sentence.

The statutes to be construed are R.C. 2929.14(C) and 2929.19(B)(2)(d). The first establishes the public policy disfavoring maximum sentences except for the most deserving offenders and reads as follows:

"[T]he court imposing a sentence upon an offender for a felony may impose the *longest prison term* authorized for the offense***_only_* upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders***, and upon certain repeat violent offenders***." (Emphasis added.) R.C. 2929.14(C).

The other statute at issue, R.C. 2929.19(B)(2)(d), sets the procedure that a trial court must follow when imposing the maximum sentence on an offender for a single offense. As applicable to Edmonson, R.C. 2929.19(B)(2)(d) requires a trial court to "*make a finding that gives its reasons for selecting the sentence imposed*" if the sentence is for one offense and is the maximum term allowed for that offense, and requires a trial court to set forth its "*reasons for imposing the maximum prison term.*" (Emphasis added.)

B

Considering, then, whether the record in Edmonson's case fulfills the statutory requirements outlined in Part II, subpart A above, we hold that it does not. As recounted above, the Edmonson sentencing fails to record a finding that Edmonson fits within one of the categories of offenders in R.C. 2929.14(C). Obviously, without the finding itself, the court also fails to provide the necessary "finding that gives its reasons." R.C. 2929.19(B)(2)(d). With this record, we cannot

confirm that the trial court heeded the enacted policy of the General Assembly meant for curtailing the imposition of maximum terms. In order to lawfully impose the maximum term for a single offense, the record must reflect that the trial court imposed the maximum sentence based on the offender satisfying one of the listed criteria in R.C. 2929.14(C).

We agree with the court of appeals that this case should be remanded for resentencing.

Judgment affirmed

Moyer, C.J., F.E. Sweeney, Pfeifer and Lundberg Stratton, JJ., concur

Resnick, J., concurs in judgment only.

APPENDIX D

IN THE SUPREME COURT OF OHIO

Case No. 99-1009

TIMOTHY J. BLONDHEIM
Petitioner,

v.

JOHN MORGAN (Warden)
Respondent.

PETITION OF TIMOTHY J. BLONDHEIM
FOR WRIT OF HABEAS CORPUS

1. The petitioner is Timothy J. Blondheim

2. On June 16, 1997, Timothy Blondheim was confined to the North Central Correctional Institution, pursuant to an order of the court of common please of Summit County, Ohio, entered on June 3, 1997. A copy of this order is annexed hereto.

3. Mr. Blondheim is still confined to this institution.

4. Mr. Blondheim is entitled to his freedom for the reason that the longest lawful sentence which the court could impose, without making the findings on the record required by R.C. 2929.14(B), was two years. The sentencing order, supra,

gave the petitioner forty-two days jail time credit toward the sentence. Therefore the petitioner is entitled to his immediate freedom.

5. The petitioner is being unlawfully deprived of his freedom.

6. The petitioner's case presents extraordinary circumstances, and petitioner has no adequate remedy at law. The Ohio Supreme Court has currently pending before it a certified conflict with regard to the statute under which the petitioner was sentenced, R.C. 2929.14. R.C. 2929.14(B) requires explicit findings on the record in order to sentence a first-time offender to any term of imprisonment longer than the maximum set by statute. Such findings were not made in this case. Notwithstanding this, the court sentenced the petitioner to a sentence more than double the maximum sentence permitted by law for a first-time offender.

The Court of Appeals for the Ninth District affirmed the sentence of the trial court, in State v. Blondheim (May 27, 1998), Summit App. No. 18594, unreported. The Ohio

Supreme Court in Case No. 98-1380, by entry dated October 7, 1998, denied Mr. Blondheim leave to appeal.

Currently pending in this Court is the case of State v. Edmonson, Supreme Court Case No. 98-2603. In Edmonson, the Eleventh District Court of Appeals reversed the trial court's imposition of sentence for failure to make the findings required by R.C. 2929.14. State v. Edmonson (Sept. 25, 1998), Portage App. No. 97-P-0067, unreported.

The Eleventh District then certified its decision to this Court as being in conflict with certain enumerated decisions from the Ninth Appellate District. State v. Edmonson (Dec. 2, 1998), Portage App. No. 97-P-0067, unreported. Among those decisions enumerated in the order of certification was the one involving the petitioner, State v. Blondheim, supra.

Buy order dated January 20, 1999, the Supreme Court determined that a conflict existed and ordered the issue briefed. State v. Edmonson (Jan. 20, 1999), Supreme Court Case No., 98-2603, 84 Ohio St.3d 1473.

Petitioner has no adequate legal remedy available to him. He has sought and been denied leave to appeal. Post-conviction relief is not available to him. Petitioner has already served the two-year maximum sentence permitted by statute for a first-time offender. Petitioner is entitled to immediate release.

For a felony of the second degree, the shortest prison term is two years, R.C. 2929.14(A)(2). For a first-time offender, the shortest prison term is also the maximum, unless the court makes the findings on the record required by the statute. R.C. 2929.14(B) says that the court "shall impose the shortest term" authorized by division (A) "if the offender previously has not served a prison term***."

Petitioner was a first-time offender. There was no finding on the record sufficient to support his continued incarceration, and there was no basis in the record for such a finding.

Petitioner has served his two years. Habeas corpus is the only remedy now available to him, to vindicate his rights

to due process and equal protection under the United States Constitution and the Constitution of the State of Ohio.

WHEREFORE, the petitioner prays for a writ of habeas corpus directing John Morgan, the warden of the North Central Correctional Institution, to bring and produce Timothy J. Blondheim before this court for a hearing and determination on his detention, and for an order of discharge from such detention and restraint of his liberty.

/s/ Bruce H. Wilson
OSB #0000989
Counsel for Petitioner

APPENDIX E

1999 TERM
IN HABEAS CORPUS

TIMOTHY J. BLONDHEIM
Petitioner,

v.

JOHN MORGAN, Warden
Respondent.

Case No. 99-1009

This cause originated in this Court on the filing of a petition for a writ of habeas corpus and was considered in a manner prescribed by law. Upon consideration thereof,

IT IS ORDERED by the Court, sua sponte, that this case be and hereby is, dismissed.

/s/ Thomas J. Moyer
Chief Justice

APPENDIX F

IN THE SUPREME COURT OF OHIO

Case No. 99-1718

TIMOTHY J. BLONDHEIM
Petitioner,

v.

JOHN MORGAN (Warden)
Respondent.

PETITION OF TIMOTHY J. BLONDHEIM
FOR WRIT OF HABEAS CORPUS

1. The petitioner is Timothy J. Blondheim

2. On June 16, 1997, Timothy Blondheim was confined to the North Central Correctional Institution, pursuant to an order of the court of common please of Summit County, Ohio, entered on June 3, 1997. A copy of this order is annexed hereto.

3. Mr. Blondheim is still confined to this institution.

4. The petitioner is being unlawfully deprived of his freedom. For a felony of the second degree, the shortest prison term is two years, R.C. 2929.14(A)(2). For a first-time offender, the shortest prison term is also the maximum, unless

the court makes the findings on the record required by the statute. R.C. 2929.14(B) says that the court "shall impose the shortest term" authorized by division (A) "if the offender previously has not served a prison term***."

5. Petitioner was a first-time offender. There was no finding on the record sufficient to support his continued incarceration, and there was no basis in the record for such a finding.

6. Mr. Blondheim is entitled to his immediate freedom, because the longest lawful sentence which the court could impose, without making the findings on the record required by R.C. 2929.14(B), supra, was two years. The sentencing order, supra, gave the petitioner forty-two days jail time credit toward the sentence. Therefore the petitioner is entitled to his immediate freedom.

7. The petitioner's case presents extraordinary circumstances, and petitioner has no adequate remedy at law.

- The Court of Appeals for the Ninth District affirmed the sentence of the trial court, in State v. Blondheim (May 27, 1998), Summit App. No. 18594, unreported.

- The Ohio Supreme Court in Case No. 98-1380, by entry dated October 7, 1998, denied Mr. Blondheim leave to appeal.

- In State v. Edmonson (Sept. 25, 1998), Portage App. No. 97-P-0067, unreported, the Eleventh District Court of Appeals reversed the trial court's imposition of sentence for failure to make the findings required by R.C. 2929.14.

- The Eleventh District certified its decision to this Court as being in conflict with certain decisions from the Ninth Appellate District. State v. Edmonson (Dec. 2, 1998), Portage App. No. 97-P-0067, unreported. Among those decisions enumerated in the order of certification was State v. Blondheim, supra.

- By order dated January 20, 1999, the Supreme Court determined that a conflict existed and ordered the issue

briefed. State v. Edmonson (Jan. 20, 1999), Supreme Court Case No., 98-2603, 84 Ohio St.3d 1473.

- On May 27, 1999, while the certified conflict was pending, and on the basis of that conflict, Timothy Blondheim filed a petition for a writ of habeas corpus with the Ohio Supreme Court.

- On June 30, 1999, the Ohio Supreme Court sua sponte dismissed the petition. Blondheim v. Morgan (June 30, 1999), Supreme Court Case No. 99-1009. A copy of that order is attached.

- On September 8, 1999, the Supreme Court affirmed the judgment of the Eleventh District Court of Appeals. State v. Edmonson (1999), 86 Ohio St.3d 324. The Court decided that, though the statute did not require the reasons for a trial court's findings, R.C. 2929.14(B) did require explicit findings on the record, in order to sentence a first-time offender to any term of imprisonment longer than the maximum set by statute.

Such findings were not made in the petitioner's case. Nevertheless, petitioner's sentence was more than double the maximum sentence permitted by law for a first-time offender.

Petitioner has no adequate legal remedy available to him. He has sought and been denied leave to appeal. Post-conviction relief is not available to him. Petitioner has already served the two-year maximum sentence permitted by statute for a first-time offender. Petitioner is entitled to immediate release.

Habeas corpus is the only remedy now available to him, to vindicate his rights under both the United States Constitution and the Constitution of the State of Ohio. Those rights are: (a) the right to a meaningful review of his case, guaranteed by the due process clauses of the state and federal constitutions; and (b) the right to equal protection under the state and federal constitutions, that is, the application of this Court's holding in State v. Edmonson, supra, to petitioner's case.

WHEREFORE, the_petitioner prays for a writ of habeas corpus directing John Morgan, the warden of the North Central Correctional Institution, to bring and produce Timothy J. Blondheim before this court for a hearing and determination on his detention, and for an order of discharge from such detention and restraint of his liberty.

/s/ Bruce H. Wilson
OSB #0000989
Counsel for Petitioner

APPENDIX G

THE SUPREME COURT OF OHIO

1999 TERM
IN HABEAS CORPUS

TIMOTHY J. BLONDHEIM
Petitioner,

v.

JOHN MORGAN, Warden
Respondent.

Case No. 99-1718

This cause originated in this Court on the filing of a petition for a writ of habeas corpus and was considered in a manner prescribed by law. Upon consideration thereof,

IT IS ORDERED by the Court, sua sponte, that this case be and hereby is, dismissed.

/s/ Thomas J. Moyer
Chief Justice

APPENDIX H

UNITED STATES DISTRICT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETITION UNDER 28 USC § 2254
FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

Name: Timothy J. Blondheim
Prisoner No. A34089900
Place of Confinement:
North Central Correctional
Institution
P.O. Box 1812, Marion, Ohio 43302
Case No. 5:99 CV 2396

TIMOTHY J. BLONDHEIM
Petitioner,
v.
JOHN MORGAN, Warden
Respondent.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Summit County (Ohio Court of Common Pleas)

2. Date of judgment of conviction April 25, 1997

3. Length of sentence 5 years

4. Nature of offense involved (all counts) Endangering children, a felony of the second degree; endangering children, a felony of the fourth degree; felonious assault, a felony of the second degree

5. What was your plea? (a) Not guilty

6. If you pleaded not guilty, what kind of trial did you have (a) Jury

7. Did you testify at the trial? No

8. Did you appeal from the judgment of conviction? Yes

9. If you did appeal, answer the following:

(a) Name of court Court of appeals for the Ninth District, Summit County, Ohio

(b) Result Trial Court's Judgment affirmed

(c) Date of result and citation, if known May 27, 1998, Summit App. No. 18594

(d) Grounds raised Trial Court failed to make the findings required for imposition of a sentence exceeding the mandatory maximum for first-time offenders

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court Ohio Supreme Court

(2) Result Motion in Support of Jurisdiction denied

(3) Date of result and citation, if known October 7, 1998, Ohio Supreme Court Case No. 98-1380

(4) Grounds raised Trial Court failed to make the findings required for imposition of a sentence exceeding the mandatory maximum for first-time offenders

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state of federal? Yes

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Ohio Supreme Court

(2) Nature of proceeding Petition for Writ of Habeas Corpus

(3) Grounds raised Ohio Supreme Court had pending before it a case certified to that Court as in conflict with petitioner's case. Petitioner asked to have his case considered concurrently, and, for parallel relief on grounds of due process and equal protection

(4) Did you receive an evidentiary hearing on your petition, application or motion? No

(5) Result Petition was dismissed sua sponte

(6) Date of result June 30, 1999

(b) As to any second petition, application or motion give the same information:

(1) Name of court Ohio Supreme Court

(2) Nature of proceeding Petition for Writ of Habeas Corpus

(3) Grounds raised The Ohio Supreme Court decided, in a case certified as in conflict with the Petitioner's case, that Trial Court must make findings sufficient to warrant imposition of a sentence in excess of the mandatory maximum for first-time offenders. *State v. Edmonson*, (1999) 86 OS.3d 324. Petitioner is seeking parallel relief on due process and equal protection grounds

(4) Did you receive an evidentiary hearing on your petition, application or motion? No

(5) Result The Petition is still pending

(6) Date of Result

(c) Did you appeal to the highest court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. No

(2) Second petition, etc. No

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: Because the first and second petitions mentioned in Paragraph 11 were originally filed in the Ohio Supreme Court – the highest state court

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

A. Ground one: The mandatory maximum sentence for first-time offenders has already been served by Petitioner.

Supporting FACTS (state *briefly* without citing cases or law) In this instance, two years is the maximum sentence a Trial Court can impose on a first-time offender, unless the Court makes a finding of record that the statutory maximum would, if not lengthened, demean the seriousness of the offense and/or the offender is likely to repeat the offense. The Trial Court failed to make these findings in the Petitioner's case.

B. Ground two: Petitioner is being held because of a denial of his right to due process

Supporting FACTS (state *briefly* without citing cases or law): There can be no effective appellate review of a Trial Court's discretion, in the manner of sentencing, without findings sufficient to show the use of that discretion was as required by Ohio law. The Ohio Supreme Court has recently held, in a case certified as in conflict with the Petitioner's case, that fact findings are mandatory to support enhancement of the Petitioner's sentence.

C. Ground three: Petitioner is being held because of a denial of his right to equal protection

Supporting FACTS (state *briefly* without citing cases or law): The Ohio Supreme Court determined that there was a direct conflict between the decisions of the two Courts of Appeal in Edmonson and Blondheim. The Supreme Court took jurisdiction of the Edmonson case based in part on that conflict, affirmed the decision in the Edmonson case, and granted no relief to Blondheim.

D. Ground four

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes, See Paragraph 11(b)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing David A. Looney, 1735 South Main St., Akron, Ohio 44301

(b) At arraignment and plea David A. Looney, 1735 South Main St., Akron, Ohio 44301

(c) At trial David A. Looney, 1735 South Main St., Akron, Ohio 44301

(d) At sentencing Edward C. Weber, 159 South Main St., Akron, Ohio 44308

(e) On appeal Bruce H. Wilson and Terence E. Scanlon, 1225 West Market St., Akron, Ohio 44313

(f) In any post-conviction proceeding Bruce H. Wilson and Terence E. Scanlon, 1225 West Market St., Akron, Ohio 44313

(g) ON appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/4/99.

/s/ Timothy J. Blondheim
Petitioner

APPENDIX I

OHIO REVISED CODE ANNOTATED

TITLE 29
CRIMES
PROCEDURE

Section 2929.14 Prison Terms

(A) Except as provided in division (C), (D)(2), (D)(3), (D)(4), or (G) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter and is not prohibited by division (G)(1) of section 2929.13 of the Revised Code from imposing a prison term on the offender, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(2), (D)(3), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a

prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D)(1)(a)(i) Except as provided in division (D)(1)(b) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony, a specification of the type described in section 2941.145 of the

Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense, or a specification of the type described in section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony, the court, after imposing a prison term on the offender for the felony under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term, determined pursuant to this division, that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If the specification is of the type described in section 2941.144 of the Revised Code, the additional prison term shall be six years. If the specification is of the type described in section 2941.145 of the Revised Code, the additional prison term shall be three years. If the

specification is of the type described in section 2941.141 of the Revised Code, the additional prison term shall be one year. A court shall not impose more than one additional prison term on an offender under this division for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a)(ii) of this section, the court is not precluded from imposing an additional prison term under this division.

(ii) Except as provided in division (D)(1)(b) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle, as defined in section 4501.01 of the Revised Code, other than a manufactured home, as defined in section 4501.01 of the

Revised Code, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under this division for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under this division relative to an offense, the court also shall impose an additional prison term under division (D)(1)(a)(i) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(b) The court shall not impose any of the additional prison terms described in division (D)(1)(a) of this section upon an offender for a violation of section 2923.12 or

2923.123 of the Revised Code. The court shall not impose any of the additional prison terms described in that division upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(2)(a) If an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender, the court shall impose a prison term from the range of terms authorized for the offense under division (A) of this section that may be the longest term in the range and that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the

Revised Code. If the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person, the court shall impose the longest prison term from the range of terms authorized for the offense under division (A) of this section.

(b) If the court imposing a prison term on a repeat violent offender imposes the longest prison term from the range of terms authorized for the offense under division (A) of this section, the court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to division (D)(2)(a) of this section and, if applicable, divisions (D)(1) and (3) of this section:

(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the

applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(3)(a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03, 2925.04, or 2925.11 of the Revised Code and that section requires the imposition of a ten-year prison term on the offender or if a

court imposing a sentence upon an offender for a felony finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code, that the offender is a major drug offender, is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or is guilty of an attempted forcible violation of section 2907.02 of the Revised Code with the victim being under thirteen years of age and that attempted violation is the felony for which sentence is being imposed, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both

of the findings set forth in divisions (D)(2)(b)(i) and (ii) of this section.

(4) If the offender is being sentenced for a fourth degree felony OMVI offense and if division (G)(2) of section 2929.13 of the Revised Code requires the sentencing court to impose upon the offender a mandatory prison term, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(4) of this section minus the sixty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty days imposed as the mandatory prison term shall equal one of the authorized prison terms specified in division (A)(4) of this section. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term

required for the offense. The court shall not sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code.

(E)(1) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony or if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(b) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, the offender shall serve the mandatory prison term consecutively to and prior to the prison term imposed for the underlying felony pursuant to division (A), (D)(2), r (D)(3) of this section or any other section of the Revised Code and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an

offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender. As used in this division, "detention" and "detention facility" have the same meanings as in section 2921.01 of the Revised Code.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), or (4) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F) If a court imposes a prison term of a type described in division (B) of section 2967.28 of the Revised Code, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a prison term of a type described in division (C) of that section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary.

(G) If a person is convicted of or pleads guilty to a sexually violent offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that offense, the court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person